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HELLER AND THE PERILS OF COMPROMISE

by
Mark Tushnet*

Heller's compromise was to invalidate one quite restrictive gun regulation while asserting that others are presumptively constitutional. The Court's opinion does not clearly explicate the methods courts are to use in analyzing gun regulations, and the analogies it draws between the First and the Second Amendments leave the methodological question open. By sketching how First Amendment methods might be applied to Second Amendment problems, this Essay suggests that the revolution in Second Amendment jurisprudence Heller wrought may be less substantial than gun-rights proponents hope.

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I. HELLER'S COMPROMISE

We now know that the Second Amendment guarantees us the right to keep handguns in our homes for purposes of self-defense. What else the Second Amendment guarantees is unclear. The Court offered a “non-exhaustive” list of regulations that, it said, its opinion “should [not] be taken to cast doubt on,” including:

longstanding prohibitions [such as those] on the possession of firearms by felons and the mentally ill, or [on] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹

Nor, according to the Court, did anything in the “analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”²

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¹ Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 & n.26 (2008).

² *Id.* at 2820.

Exactly why these regulations are “presumptively lawful”³ is obscure, as is what might be sufficient to overcome the presumption.

The reason is that these components of *Heller* are transparent additions. They were clearly tacked on to the opinion to secure a fifth vote (presumably Justice Anthony Kennedy’s). But compromises run the risk of undermining whatever principle the Court’s conclusion rests on. Proponents of gun rights should temper their celebrations by keeping the lesson of the so-called Federalism Revolution of the 1990s in mind: as noted in the title of an article on the Court’s federalism cases co-authored by two such proponents, what if they held a revolution and nobody came?⁴

The *Heller* revolution may not be quite as limited as the Federalism Revolution has been. The guarantee of gun possession in the home might be consequential. It might deter assaults on law-abiding homeowners,⁵ and it might reduce the incidence of robberies of occupied homes, as gun-rights proponents sometimes suggest. It might also lead to the deaths of some Americans, both law-abiding and otherwise, as gun-control proponents sometimes suggest.⁶ And, as Glenn Reynolds and Brannon Denning point out, gun-rights proponents are likely to be significantly more aggressive in supporting litigation challenging gun regulations than were the purported beneficiaries of the Federalism (and Takings) Revolutions.⁷ But, because complete bans on gun possession in the home like that in the District of Columbia are quite rare, *Heller*’s effects on crime, violence, and gun violence are likely to be small either way. Indeed, I think it worth noting my view, based on a survey of the relevant policy literature, that the best estimate one can give for the effects of *any* gun policy likely to emerge from the U.S. political process—whether it be a gun-rights or a gun-control policy—is close to zero.

Of course compromises can unravel in either direction,⁸ and *Heller* might portend quite robust restrictions on gun regulations. The track

³ *Id.* at 2817 n.26.

⁴ Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000).

⁵ I use the term “homeowners” as a short-hand that includes tenants in their rented residences.

⁶ The latter point echoes a concern Justice Antonin Scalia expressed in *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting) (“[The decision] will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic.”). The reference to necessity is presumably a description of the Second Amendment.

⁷ Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2040 (2008).

⁸ I discuss the possibility of an unraveling in the direction of a robust Second Amendment below.

record of recent conservative constitutional “revolutions” is not encouraging though, from the perspective of gun-rights proponents.⁹

II. THE ANALOGY TO THE FIRST AMENDMENT

Heller’s compromises are perhaps even more interesting because they are compromises with *only* legal effects, not policy ones.¹⁰ And, as I have suggested, even those legal effects might be small, precisely because *Heller* is a compromise. *Heller* might be a failed revolution (from gun-rights proponents’ point of view) because the Court acknowledges that “Like most rights, the right secured by the Second Amendment is not unlimited.”¹¹ The opinion also gives examples, as noted above, of presumptively lawful limits on the Second Amendment right.¹² But *Heller*’s compromise includes a deep ambivalence, amounting perhaps to a contradiction, about how we are to analyze the constitutionality of limitations on the Second Amendment right. Justice Scalia’s majority opinion is rife with an absolutist rhetoric about the methods of constitutional interpretation, but the compromises embedded in the opinion are inconsistent with that rhetoric. And the absolutist rhetoric is mistaken: For a number of reasons the interest-balancing that Justice Scalia derides as inconsistent with proper interpretive method is inevitable, even within the methodological approach Justice Scalia endorses.

Justice Stephen Breyer in dissent argued for “an interest-balancing inquiry” in which the Court would ask “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”¹³ Justice Scalia responded that this misunderstood the structure of the protection of rights in our Constitution. He compared the Second Amendment with the First.¹⁴ Yet, the structure of First Amendment analysis, in virtually every incarnation (save perhaps one), utilizes the kind of interest-balancing inquiry that Justice Scalia asserted was

⁹ See also Reynolds & Denning, *supra* note 7, at 2038 (reaching a similar conclusion).

¹⁰ Had the dissenters in *Heller* prevailed, the costs of defending gun-control regulations in litigation would have decreased dramatically, but the political costs of enacting new regulations and avoiding the repeal of old ones would (as a result, I think) have also increased. With *Heller* on the books, the litigating costs will increase, but the political ones might decrease because *Heller* takes out of the domain of political argument the slippery-slope—“If you let them enact this one, it’s only a step toward confiscation of your weapons”—that has been quite effective in the politics of gun policy.

¹¹ Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008).

¹² *Id.* at 2816–17.

¹³ *Id.* at 2852 (Breyer, J., dissenting).

¹⁴ *Id.* at 2799. The comparison is with the First Amendment’s free speech guarantee and not its religion clauses, and I confine my analysis accordingly.

inappropriate for the Second, precisely for the purpose of identifying which regulations of speech are constitutionally permissible.

I think exposition of the problems with *Heller*'s compromises is best begun by describing several modes of First Amendment analysis and then continued by describing the places in Justice Scalia's opinion that use analogues to each mode. The thing to keep in mind is that each mode of First Amendment analysis ends up incorporating some form of interest-balancing.

The first mode of First Amendment analysis is one in which activities covered by the First Amendment are sharply distinguished from those not so covered. Call this the "inside-outside" model: Regulations of speech "inside" the First Amendment are presumptively unconstitutional, while regulations of forms of expression outside the First Amendment receive no special First Amendment scrutiny. So, to use the example Justice Scalia uses in *Heller*, the First Amendment covers "the expression of extremely unpopular and wrong-headed views," but does not cover obscenity and libel.¹⁵ How do we determine what categories of speech are outside the First Amendment? For reasons not worth developing here, the answer cannot be, "By examining the original understanding of the words 'abridging the freedom of speech.'"¹⁶ Rather, we determine the boundaries between the inside and the outside by considering the purposes the First Amendment serves and whether the regulation at issue is inconsistent with those purposes.¹⁷ On standard views, that determination involves some form of interest-balancing.¹⁸

¹⁵ *Id.* at 2821.

¹⁶ See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008), for a brief discussion of this proposition.

¹⁷ This explains the Court's holding, in an opinion written by Justice Scalia, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that a viewpoint-based regulation of fighting words, ordinarily a category of expression described as outside the First Amendment, is constitutionally impermissible: Eliminating viewpoint as a basis for regulating expression is one of the First Amendment's primary purposes.

¹⁸ Justice Scalia repeatedly suggests that a historical rather than an interest-balancing approach will work with respect to the Second Amendment, but this seems to me quite unlikely. His suggestions occur in connection with his enumeration of presumptively constitutional regulations. See, e.g., *Heller*, 128 S. Ct. at 2821 ("Justice Breyer chides us for . . . not providing extensive *historical* justification for those regulations of the right that we describe as permissible." (emphasis added)). The thought is that we can explain the presumptive constitutionality of the regulations by identifying regulations in place in 1791 that were not then understood to be incompatible with the right to keep and bear arms. So, for example, regulations of "dangerous and unusual weapons" were acceptable to the framing generation. See *id.* at 2817. We can use this fact, Justice Scalia suggests, to identify types of weapons that can be regulated today. The process is something like this: What were the characteristics of the weapons then understood to be unusual and dangerous, and what weapons today have those characteristics? The difficulty with this mode of analysis is that we are quite likely to have a relatively small data base from the past of permissible regulations—thinner with respect to some than with respect to others, of course. And the smaller the base, the harder it will be to identify characteristics—in any way that is not transparently the product of *contemporary* rather than framing-era

A second mode of First Amendment analysis is a slight extension of the “inside-outside” model. Here there are numerous categories of expressive activities, some close to the heart of the First Amendment’s purposes, some not as close, and some quite remote. Call this the “onion-layer” model, in which categories of speech receive different degrees of protection—“standards of scrutiny,” as Justice Scalia uses the term¹⁹ in *Heller*—depending on how close to the First Amendment’s heart they are. In this model, interest-balancing occurs twice: once in determining which categories of speech receive which level of scrutiny, and then, with the exception of speech at the First Amendment’s core, in determining whether the regulation at issue is constitutionally permissible.

A third mode of First Amendment analysis deals with what used to be called “time, place, and manner” regulations and are now called content-neutral regulations. Here interest-balancing is all there is: A court considering the constitutionality of a “time, place, and manner” regulation directly balances the impairment of expression against the degree to which the regulation accomplishes the government’s permissible purposes.

III. DIFFICULTIES IN DETERMINING THE LIMITS ON SECOND AMENDMENT RIGHTS

Return now to the Second Amendment.

In the “inside-outside” model of the First Amendment there are core protections and categorical exclusions—actually, sharp boundaries separating what is protected from what is not. So too, Justice Scalia suggests, with the Second Amendment. The presumptively lawful regulations he lists lie outside the Second Amendment’s scope and are constitutional if rational.²⁰

The prohibitions on carrying weapons in “sensitive places” fit into this structure easily enough. The Second Amendment’s core protection is of gun ownership for purposes of “defense of hearth and home.”²¹ Schools and government buildings are not anyone’s home and so fall

judgments—that we are going to then analogize to the characteristics found in today’s circumstances. Alternatively, what we identify as the relevant characteristics of the framing-era regulations will be the product of our contemporary concerns rather than characteristics that those in the founding generation understood to be the ones that made regulation permissible. (Or, even more likely, people in the founding generation would not have had any common understanding about the characteristics that explain why the regulations that all agreed were permissible were consistent with the right to keep and bear arms.) These are general difficulties with the originalist project as implemented in *Heller*. For a broader discussion of such difficulties, see Tushnet, *supra* note 16.

¹⁹ *Heller*, 128 S. Ct. at 2817.

²⁰ For the rationality requirement, see *id.* at 2817–18 n.27 (referring to “the separate constitutional prohibitions on irrational laws”).

²¹ *Id.* at 2821.

categorically outside the Second Amendment's scope.²² The permissibility of banning gun possession by felons is harder to understand, given *this* structure of analysis. Felons who have served their sentences are no less susceptible to home invasions and assaults than are law-abiding people (perhaps even more susceptible).

This problem leads to a more general one: how are we to determine the boundaries separating the protected constitutional right from the unprotected area? It should be clear that the originalist approach taken by the Court is unhelpful here: Seeking the original meaning of the Second Amendment might lead us to an understanding of what is inside the boundary—the core or heart of the Second Amendment and some “nearby” rights—but not where the boundary is.²³ The best candidate for a method of locating the boundary is what in the First Amendment context is called categorical balancing, where it is the usual explanation for the exclusions to which Justice Scalia referred. As noted briefly above, a court engaging in categorical balancing identifies the purposes served by the protection of the constitutional right at the core and asks whether the general type of regulation at issue is sufficiently related to those purposes as to warrant the same strong presumption against constitutionality, or alternatively, whether the regulation is so far removed from the right's core purposes that it is constitutionally permissible.²⁴ Importantly, regulation of subjects outside the boundary need not have *no* adverse effects on the subject inside the boundary; rather, courts conclude that those adverse effects or burdens are thought

²² One might wonder about the status of university dormitories. Further, one can read passages in the Court's opinion to suggest that the Second Amendment guarantees a right to use weapons in self-defense whether in the home or not. Then, however, the presumptive constitutionality of bans on guns in sensitive places becomes either quite puzzling or strongly conditioned on the definition of the category “sensitive places.” As to the first, obviously there is no difference between the home and the outdoors when one is threatened with assault: If you have a free-standing right to use weapons in self-defense, where the assault occurs is happenstance. As to the second: Again, if you have a free-standing right to use weapons in self-defense in some places outside the home but not others, how can we distinguish between courthouses and schools, or indeed between courthouses and the streets? Given the Court's divisions on figuring out the original understanding of the Second Amendment with respect to gun possession in the home, it seems to me extremely implausible that such distinctions might emerge from further examination of original understanding. Rather, some sort of interest-balancing seems inevitable.

²³ As I understand it, proponents of the kind of originalism used in *Heller* refer to the question noted in the text as one that leads courts to do what they call constitutional construction rather than constitutional interpretation. (I am insufficiently familiar with that kind of originalism to be as confident as I would like to be about the foregoing assertion.)

²⁴ For example, on this account obscenity and fighting words are categorically excluded from First Amendment protection because regulation of obscenity and fighting words does not pose the risks of suppression of political and other “high value” speech that are the central concern of that Amendment.

justified by the policy goals the government seeks to achieve through the regulation.²⁵

Applied to the Second Amendment and the examples Justice Scalia offers of presumptively constitutional regulations, categorical balancing might lead to an analysis along the following lines: True, felons have no smaller need for guns to defend themselves in the home than anyone else, but the fact that they committed a felony in the past indicates that they are less likely to abide by clearly permissible restrictions on gun use, for example in committing other crimes. Balancing the self-defense interest against the public-protection interest, we exclude felons from the Second Amendment's protection.²⁶

Elsewhere, though, Justice Scalia's opinion suggests the "onion model" analytic structure. The gun regulation at issue in *Heller*, the opinion says, would fail "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."²⁷ In general, a "standards of scrutiny" approach is different from one seeking to define the boundaries of a protected right. Under the latter approach, all one asks is whether a protected right is burdened: If it is, regulation is impermissible, and if it is not, regulation is permissible if rational.²⁸ Under a "standards of scrutiny" approach, one asks, "Given that a protected right is burdened by this regulation, and given the character of that right, how strong a justification does the government need to have to impose this kind of burden?" Roughly speaking, where the right is fundamental and is burdened more than trivially, the regulation receives strict scrutiny, and the government must provide very good reasons ("compelling" ones, in the doctrinal jargon) for imposing the burden and must show that the regulation does quite a good job of achieving the government's purposes (the regulation is "narrowly tailored"). The

²⁵ The classic formulation in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), makes this clear: "It has been well observed that such utterances are no *essential* part of any exposition of ideas, and are of *such slight social value* as a step to truth that any benefit that may be derived from them is *clearly outweighed* by the social interest in order and morality" (emphasis added). *Id.* at 572.

²⁶ Two observations about this analysis: (1) It is not clear why the relevant category is *felons* rather than, for example, *felons who have committed violent crimes* (or even *felons who have committed crimes using guns*). The incremental risk to the public from gun ownership by white-collar criminals seems to me rather small. (2) If categorical balancing explains the presumptively lawful limitations on gun possession and ownership, the force of Justice Scalia's criticism of Justice Breyer's approach is markedly diminished, for as I discuss in this Essay, Justice Breyer is best taken as advocating not case-by-case balancing as Justice Scalia asserted, but precisely a form of categorical balancing. I examine some additional aspects of this understanding of Justice Breyer's approach in a companion essay, Mark Tushnet, *Heller and the Critique of Judgment*, SUP. CT. REV. (forthcoming 2009).

²⁷ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

²⁸ This approach requires some attention to the identification of what counts as a burden, a problem familiar in the constitutional law of free exercise of religion. For a discussion, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

doctrinal formulations of other standards of scrutiny vary. The core problem involves an important but not quite fundamental right, which is burdened to some significant (although perhaps not “substantial”) degree. Here the government has to have pretty good reasons for its regulation, although the reasons do not have to be “compelling,” and the regulation has to do a decent although not “almost perfect” job of achieving its goals.

Oddly, but almost certainly because of the opinion’s compromises, Justice Scalia *asserts* that the ban on handgun possession in the home would not survive “any of the standards of scrutiny” applied to enumerated rights but does not explain why. The next paragraph of the opinion begins, “Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban,” and the succeeding one describes the “many reasons that a citizen may prefer a handgun for home defense.”²⁹ This establishes, I suppose, that the burden on the right is substantial or even really, really big. That might be sufficient to establish a constitutional violation in the “inside-outside” model.

But, as I have observed, a “standards of scrutiny” approach requires two additional steps, identifying of the government’s purposes in regulating and determining the aptness of the regulation to those purposes. And, as far as I can tell, there is nothing in the opinion taking either of those steps. In what at first seems to be the final sentence of the “standards of scrutiny” analysis, Justice Scalia writes, “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”³⁰ That conclusion is fine for a boundary-determining analysis, but is quite inadequate for the “standards of scrutiny” analysis in which it appears to be embedded. This is one point where *Heller*’s compromises generate a methodological tension if not more than that.

Compromises being what they are, Justice Scalia wanders back to the boundary-determining or “inside-outside” analysis: “The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”³¹ Note that “case-by-case” does the heavy lifting here. And the term is perhaps inapt. A true “case-by-case” analysis would ask, for example: Given the circumstances in which Dick Heller (the respondent asserting a right to keep a handgun in his home) found himself, was the government justified in barring him from keeping a handgun in his home? Did he live in a particularly high-crime neighborhood, had he been the victim of home invasions in the past,

²⁹ *Heller*, 128 S. Ct. at 2818.

³⁰ *Id.*

³¹ *Id.* at 2821.

how well-trained was he in the use of handguns?³² Justice Breyer asked none of those questions. Rather, he asked what the District of Columbia's crime rate was, how prevalent unlawful uses of guns was, and the like. His balancing approach was "regulation-by-regulation," not "case-by-case."³³

The more accurate term "regulation-by-regulation" basis, though, brings out the degree to which Justice Scalia's "jurisprudential" foray ends in confusion.³⁴ Start with Justice Scalia's discussion of *which* weapons are—to use boundary-defining language—within the scope of the Second Amendment. These are weapons "in common use at the time."³⁵ But, Justice Scalia does not mean that the Second Amendment protects only the possession of muskets and old-fashioned pistols. Rather, "in common use at the time" means "weapons . . . typically possessed by law-abiding citizens for lawful purposes."³⁶ Why? The answer must be based in some sort of policy analysis and balancing, perhaps that contemporary handguns are "enough like" muskets and pistols with respect to their ability to protect against assaults in the home and to their susceptibility to dangerous misuse, where the metrics of ability-to-protect and misuse take contemporary circumstances into account. But that is precisely the kind of analysis called for by regulation-by-regulation balancing.³⁷

A similar analysis explains why "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" apparently supports bans on possession of M-16 rifles.³⁸ Why do M-16s fall within the category of "dangerous and unusual weapons"? Again, the answer, at least as to dangerousness, has to come from some policy analysis and balancing; perhaps, for example, dangerous weapons are those that, while admittedly more effective in providing defense against assaults, pose significantly higher risks of harm when misused, and their greater effectiveness is outweighed by the higher risk.

³² For an example of a true "case-by-case" analysis, see *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003), discussed in MARK TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 123–24 (2007).

³³ *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting).

³⁴ For the term "jurisprudential," see *Heller*, 128 S. Ct. at 2821. I must note that what follows is hardly novel, except in its application of an analysis well-developed in the First Amendment literature to the Second Amendment.

³⁵ *Id.* at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

³⁶ *Id.* at 2816. Note that this formulation makes sense only because the regulation at issue was, as noted, unusual in its coverage. Residents of the District of Columbia could not lawfully possess handguns, but people living elsewhere could. Does this imply that a nationwide ban on handgun possession would not violate the Second Amendment because then handguns could not be possessed by law-abiding citizens?

³⁷ To see the point, consider that there is no doubt whatsoever that the Court would have found the District of Columbia's regulation unconstitutional even had it included an exception allowing the possession of immediately operable pistols and muskets.

³⁸ *Id.* at 2817. Perhaps to niggle: Does a historical tradition prohibiting "carrying" dangerous and unusual weapons encompass a ban on possessing such weapons in the home?

Note the analytic structure here. Some sort of originalism identifies the boundaries of the protected right in general terms, but some sort of policy-based balancing tells us whether a particular regulation falls inside or outside those boundaries. Justice Breyer's approach has the same structure, with only one difference: He does the policy-balancing first, and uses its result to identify the boundaries of the protected right. This may look like a significant difference: The Court's opinion is originalist in identifying the protected rights and policy-based only in identifying which contemporary regulations fall within and outside the Second Amendment's boundaries, while Justice Breyer's is, at its heart, only policy-based. Yet appearances are misleading, because all the serious work is done at the boundaries. Justice Breyer's opinion, for example, emphasizes how important it is to his analysis that the handgun ban applies only in an urban area with an especially high crime rate.³⁹ As an analytic matter, there is no difference between extending the Second Amendment's protection from muskets and pistols to contemporary handguns and restricting its scope to geographic areas like those in the United States of 1791—thinly populated, with rates of crime and assault low relative to contemporary figures.

In short, determining the actual boundaries of the Second Amendment—figuring out what falls within the protected core and what is in the unprotected area beyond—is a process that involves categorical or statute-by-statute balancing of the policies underlying the constitutional guarantee. Justice Scalia concludes that the Second Amendment “is the very *product* of an interest-balancing by the people.”⁴⁰ As stated, true enough, but also as stated, entirely unhelpful in determining where the Amendment's boundaries lie. Boundary-determination by means of categorical balancing and regulation-by-regulation balancing are the same thing. Despite the tone of Justice Scalia's opinion, he is on the same methodological page as Justice Breyer, though he cannot admit the fact.

Next, consider the analogy to “time, place, and manner” regulations. Such regulations prohibit or place conditions on the exercise of speech undoubtedly protected against complete prohibition by the First Amendment. So, for example, *Kovacs v. Cooper* upheld a ban on using sound trucks in residential neighborhoods, even when the sound trucks were used to amplify a political candidate's message.⁴¹ The standard for evaluating time, place, and manner regulations is that they must be reasonable, and “justified without reference to the content of the regulated speech, . . . [be] narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information.”⁴² And, more specifically:

³⁹ See, *id.* at 2854–55 (Breyer, J., dissenting).

⁴⁰ *Id.* at 2821.

⁴¹ *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁴² *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 293 (1984).

What our decisions require is a “fit” between the legislature’s ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is “in proportion to the interest served,” that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.⁴³

As the Court has emphasized, this requires more than mere rationality,⁴⁴ but it also clearly requires some sort of balancing (and deference to legislative judgment).

I note, and in a moment will return to, the point that the analogy Justice Scalia draws between the First and the Second Amendments need not imply that specific doctrinal formulations developed to deal with First Amendment questions can transfer directly to the Second Amendment. Before doing so, though, I think two matters deserve some attention. The first is again methodological. The Court’s treatment of “time, place, and manner” regulations shows that balancing of some sort is not foreign to the evaluation of regulations of constitutionally protected activities.⁴⁵

Second, to the extent that a direct analogy to “time, place, and manner” regulations is appropriate, most—I would say almost all—regulations of weapons are indeed such regulations. Bans on carrying weapons in specific areas, for example, are clearly “place” regulations. Bans on possessing “dangerous and unusual weapons” are easily described as “manner” regulations. Were the courts to adopt the tests used for “time, place, and manner” regulations to deal with Second Amendment questions, the central questions would be whether the regulations were narrowly tailored to advance the interests the government seeks to advance and whether they allowed ample alternative methods of exercising the right protected by the Second Amendment, subject to some degree of judicial deference to legislative judgment.⁴⁶ Notably, the District of Columbia regulation might be unconstitutional under this formulation: The right protected is a right to use weapons in self-defense while in one’s home,⁴⁷ and the handgun ban did not leave

⁴³ *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (internal citations omitted).

⁴⁴ *See, e.g., id.* at 480–81 (“the test we have described is . . . far different . . . from the ‘rational basis’ test Here we require the government goal to be substantial, and the cost to be carefully calculated.”).

⁴⁵ Of course, it might be appropriate only when something like a “time, place, and manner” regulation is involved, and determining the appropriate analogue to such a regulation in the Second Amendment context may not be easy.

⁴⁶ Subject to a question, discussed below, of what the analogue to having a justification unrelated to the suppression of expression is.

⁴⁷ Justice Breyer’s dissent disagrees with this formulation of the right, which is why he discusses such things as the ability of residents of the District of Columbia to engage in neighboring jurisdictions in hunting and gun-related sports such as target-

homeowners with “ample”—or indeed any real—alternative methods of exercising that right.⁴⁸ I think it worth observing that, were the courts to adopt an approach like this one, *Heller*’s practical effects are likely to be quite small. The decision would invalidate complete bans on handgun possession in the home and their equivalent, such as permit requirements so restrictive as to amount in practice to an effective ban on such ownership.⁴⁹

Yet, the analogy between the First and the Second Amendments faces one major difficulty. Modern scholarship has shown that the old term “time, place, and manner” is misleading. What distinguishes these regulations from others is that they are, as quoted above, justified without reference to the content of the speech: True, in *Kovacs* political candidates could not use sound trucks, but neither could those advertising the availability of ice cream. I find it quite difficult to figure out what might be the analogy in the Second Amendment context to the distinction between content-based and content-neutral regulations.

One possibility is that regulations would be “Second Amendment neutral” if they are justified by government interests unrelated to a person’s ability to use weapons in self-defense at home. This formulation runs up against at least two difficulties. First, and less important, it might introduce doctrinal redundancy. As I noted earlier, the regulation in *Heller* might be unconstitutional because it did not leave ample alternative opportunities for armed self-defense at home. Treating the regulation as “Second Amendment neutral” might make it unconstitutional at the triggering stage. Second, and more important, I find it hard to imagine a regulation that is not justified by interests unrelated to the ability to use weapons in self-defense at home. Trigger-lock and similar safe-storage requirements are justified by the interest in avoiding accidental shootings, not in connection with self-defense. Indeed, the complete ban on possession of handguns could be, and was sought to be, justified by the government interest—in a city with a high rate of burglary—in ensuring that law-breakers not have access to weapons stolen from the homes of law-abiding citizens.

More generally, the intuition behind the doctrines dealing with content-neutral regulations is that they are not “about” speech, but rather are “about” urban amenities like quiet or “about” the streets, and only incidentally restrict the dissemination of expression. In contrast,

shooting: These possibilities show to him that the District’s residents have ample alternative methods of exercising their right to own handguns. *Heller*, 128 S. Ct. at 2861 (Breyer, J., dissenting).

⁴⁸ Here too the presumptively constitutional ban on gun ownership by felons is more troublesome, because, for reasons noted above, it might not be narrowly tailored, although deference to legislative judgment might be enough to support the conclusion that such a ban is constitutionally permissible.

⁴⁹ See also Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007) (describing the doctrinal formulations used by state courts interpreting state constitutional protections of gun rights).

gun regulations are “about,” well, guns. If I have provided accurate descriptions of the First Amendment intuition and gun regulations, almost every gun regulation would be analogous to a content-based regulation of expression. And, if that is so, *Heller*’s compromises might well unwind completely.

Gun-control proponents would like to read Justice Scalia’s observation that the regulation in *Heller* could not survive any level of review to mean that it fails intermediate scrutiny. That, though, is not what the sentence says. It could just as easily mean that the regulation fails strict scrutiny. Here, the compromise lies in avoiding specifying what the applicable standard of review is because some in the *Heller* majority thought that the proper standard was intermediate scrutiny and others thought that it was strict scrutiny. As I have suggested at several points and now make explicit, strict scrutiny is more compatible with the methodological approach Justice Scalia explicitly defends, intermediate scrutiny with the approach he explicitly criticizes.

But, of course, even if strict scrutiny is not inevitably fatal,⁵⁰ it surely is debilitating. That is, regulations rarely survive strict scrutiny. Gun regulations would be particularly susceptible to invalidation on the ground that they are not narrowly tailored to the interests the government seeks to advance by them. The reason is that gun regulations typically achieve quite small reductions in virtually everything the government might say it was trying to accomplish: At their best they produce small reductions in crime, violence, gun violence, accidental deaths caused by guns, whatever and—even worse from the viewpoint of gun-control proponents seeking to explain why regulations survive strict scrutiny—gun regulations typically produce offsetting *increases* (perhaps not fully offsetting, but enough to be worrisome under a strict scrutiny approach) in the same metrics of crime, violence, and the like.⁵¹

So, could safe-storage laws satisfy strict scrutiny? I suspect not, at least if the doctrinal test is fairly applied.⁵² Safe-storage laws reduce death and injury from accidental firings, but they increase death and injury during home invasions and assaults. Their net effect may be positive, but might not be large enough to satisfy a serious narrow-tailoring requirement. What of bans on gun possession in sensitive places? Again, probably not. They might deter some unlawful uses of guns in those places—the classic mass or courthouse shootings—but they also make it impossible for armed bystanders to intervene before more serious harm occurs. Here too the regulations might not satisfy the narrow-tailoring requirement. Note, though, that these just are the regulations *Heller*’s compromises

⁵⁰ I allude here to *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Strict scrutiny is not ‘strict in theory, but fatal in fact.’”) (internal citation omitted).

⁵¹ For an introductory overview of the relevant research, see TUSHNET, *supra* note 32, at 75–111.

⁵² I insert the qualification to take account of the possibility of a disingenuous invocation of strict scrutiny when actually applying some weaker standard of review.

said were presumptively constitutional. Under strict scrutiny, the presumption might well be overcome with respect to those very regulations.

IV. CONCLUSION

Describing some regulations of gun ownership and use as presumptively constitutional seems to have been a necessary compromise, from Justice Scalia's point of view. But compromises are risky because they provide the opportunity for later decision-makers to move in either direction—toward invalidating even some of the presumptively constitutional regulations or, importantly, toward upholding everything but the regulation struck down in *Heller*—while maintaining that they are acting within the doctrine set out in *Heller*. As I have discussed in more detail elsewhere, gun policy is one of the locations where Americans conduct our culture wars.⁵³ *Heller's* meaning will be determined by—and in—future battles in those wars. I for one would not be amazed to discover the gun-rights revolution turning out much like the federalism and takings revolutions, and for the same reason: Culture wars produce repeated battles in the courts and symbolic victories and defeats there, but permanent victory comes from developments elsewhere, which then yield real rather than symbolic decisions by the courts.

⁵³ TUSHNET, *supra* note 32.